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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, *et al.*,

Appellants,

—v.—

JAMES E. SWANN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statement 3

Introduction 3

Proceedings during 1969-70 before a Single District Judge 4

Obstruction of the District Court Orders; Convening of Three-Judge Court 7

Some Facts on Student Transportation 12

Summary of Argument 17

ARGUMENT

I. The Court Below Correctly Held that a Portion of N.C. Gen. Stat. §115-176.1, Known as the Anti-Busing Law Is Unconstitutional and in Violation of the Equal Protection Clause and the Supremacy Clause of the Constitution of the United States 20

A. Introduction—The Provisions of the Statute 20

B. The statute unconstitutionally interferes with the school board's affirmative duty to dismantle the dual system. 26

PAGE

C. The Appellants' Argument Supporting the Statute Rests on a rejected view that there is no affirmative duty to desegregate the schools 30

D. Additionally §115-176.1 is unconstitutional because it violates the principles stated in *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and also the doctrine of *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). 33

E. The Court Below correctly Concluded that §115-176.1 also violates the Supremacy Clause of Article VI of the Constitution 36

II. The Appellants Other Objections to the Judgment Below Are Also Insubstantial 40

A. The motions to dismiss were properly denied 40

B. The District Court was empowered to stay State Court proceedings to protect or effectuate its judgments 41

C. The Civil Rights Act of 1964 does not support appellants' argument 42

III. The Court Has No Jurisdiction of the Appeal Under the Doctrine of *Bailey* v. *Patterson*, 369 U.S. 31 42

CONCLUSION 44

PAGE

BRIEF APPENDIX A—

Notification and Request for Designation of Three-Judge Court with attached Exhibits D, E, F, and G (filed February 20, 1970) 1a

Exhibit A—
Opinion and Order of December 1, 1969 [omitted in printing, see Appendix in No. 281, p. 698a] 5a

Exhibit B—
Opinion and Order of February 5, 1970 [omitted in printing, see Appendix in No. 281, p. 819a] 5a

Exhibit C—
Order dated December 2, 1969 [omitted in printing, see Appendix in No. 281, p. 717a] 5a

Exhibit D—
Complaint, Amended Complaint and two Orders of Superior Court in *Harris* v. *Self* 6a, 14a, 19a, 21a

Exhibit E—
Statement by Governor Scott 23a

Exhibit F—
Letter by Governor Scott 26a

Exhibit G—
Statement by Dr. Craig Phillips 27a

BRIEF APPENDIX B—

Opinion and Order of Three-Judge District Court in *Alabama* v. *United States, et al.*, S.D. Ala., No. 5935-70-P, June 26, 1970 ..... 29a

Order of Dismissal 39a

PAGE

Table of Cases:

Alabama v. United States, —— F. Supp. —— (S.D. Ala. Civ. No. 5935-70-P, June 26, 1970) 30, 39, 43
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 43

Bailey v. Patterson, 369 U.S. 31 (1962) 2, 11, 19, 43
Bivins v. Bibb County Board of Education (M.D. Ga., No. 1926, May 22, 1970) 39
Briggs v. Elliott, 132 F. Supp. 776 (E.D. S.C. 1955) 30
Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966, en banc), cert. denied, 386 U.S. 975 (1957) 18, 32, 33
Brown v. Board of Education, 347 U.S. 483 (1954) 2, 26, 28, 30, 35, 36, 41
Brown v. Board of Education, 349 U.S. 294 (1955) 26, 29
Brown v. South Carolina State Board of Education, 296 F. Supp. 199 (D. S.C. 1968), judgment affirmed, 393 U.S. 222 (1968) 37
Bryant v. State Board of Assessment, 293 F. Supp. 1379 (E.D. N.C. 1968) 41
Bush v. Orleans Parish School Board, 187 F. Supp. 42 (E.D. La. 1960), stay denied, 364 U.S. 803, judgment affirmed, Orleans Parish School Board v. Bush, 365 U.S. 569 (1961) 19, 36, 42
Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La. 1960), stay denied, sub nom. Louisiana v. United States, 364 U.S. 500 (1960), judgment affirmed,, 365 U.S. 569 (1961) 18, 36, 38
Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La. 1960), judgment affirmed, New Orleans v. Bush, 366 U.S. 212 (1961) 36
Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La. 1961), judgment affirmed sub nom. Legislature of Louisiana v. United States, 367 U.S. 907 (1961) 36

PAGE

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La. 1961), judgment affirmed sub nom. Tugwell v. Bush, 367 U.S. 907 (1961) 36

Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970) 44
Cooper v. Aaron, 358 U.S. 1 (1958) 36, 41

Denny v. Bush, 367 U.S. 908 (1961) 36
Dowell v. Board of Education of the Oklahoma City Public Schools, 396 U.S. 269 (1969) 43
Dowell v. Board of Education of the Oklahoma City Public Schools, 244 F. Supp. 971 (W.D. Okla. 1965), affirmed, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931 (1967) 32

Ex parte Poresky, 290 U.S. 30 (1933) 43

Faubus v. United States, 254 F.2d 797 (8th Cir. 1958), cert. denied, 358 U.S. 829 40

Godwin v. Johnston County Board of Education, 301 F. Supp. 339 (E.D. N.C. 1969) 40
Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 2, 18, 19, 26, 27, 28, 29, 30, 43
Gremillion v. United States, 368 U.S. 11 (1961) 36

Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), judgment affirmed, 368 U.S. 515 (1961) 37
Harris v. Self 3, 7, 25, 41
Harvest v. Board of Public Instruction of Manatee County, 312 F. Supp. 269 (M.D. Fla. 1970) 40
Hunter v. Erickson, 393 U.S. 385 (1969) 2, 18, 33, 34

In the Matter of Peterson, 253 U.S. 300 (1920) 41

PAGE

Katzenbach v. Morgan, 384 U.S. 641 (1966) 42
Keyes v. School Dist. No. 1, Denver, Colo., 313 F. Supp. 61 (D. Colo. 1970) 35

Lee v. Macon County Board of Education, M.D. Ala. Civ. No. 604-E, March 12, 1970, March 16, 1970, March 23, 1970 39
Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967), affirmed sub nom. Wallace v. United States, 389 U.S. 215 (1967) 36, 40
Lee v. Nyquist, —— F. Supp. —— (W.D. N.Y. Civil 1970-9, Oct. 1, 1970) 18, 33, 35
Louisiana Education Commission for Needy Children v. U.S. District Court, 390 U.S. 939 (1968) 37

Marbury v. Madison (US) 1 Cranch 137 (1803) 40
Meredith v. Fair, 328 F.2d 586 (5th Cir. 1962) 40, 42
Mitchell v. Donovan, 398 U.S. 427 (1970) 11
Moore v. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503 (W.D. N.C. 1970) 1, 11
Moore v. Charlotte-Mecklenburg Board of Education, No. 444, O.T. 1970 4

Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), judgment affirmed 389 U.S. 571 (1968) 37
Poindexter v. Louisiana Financial Assistance Commission, 296 F. Supp. 686 (E.D. La. 1968), judgment affirmed, sub nom. Louisiana Education Commission for Needy Children v. Poindexter, 393 U.S. 17 (1968) 37

Railway Mail Association v. Corsi, 326 U.S. 88 (1945) 31
Reitman v. Mulkey, 387 U.S. 369 (1967) 2, 18, 33, 35
Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970) 11

PAGE

Shapiro v. Thompson, 394 U.S. 618 (1969) 42
Sparrow v. Gill, 304 F. Supp. 86 (W.D. N.C. 1969) 13
Sterling v. Constantin, 287 U.S. 378 (1932) 40
Swann v. Charlotte-Mecklenburg Board of Education, No. 281, O.T. 1970 ..... 3, 4
Swann v. Charlotte- Mecklenburg Board of Education, 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966); 300 F. Supp. 1358 (1969); 300 F. Supp. 1381 (1969); 306 F. Supp. 1291 (1969); 306 F. Supp. 1299 (1969); 306 F. Supp. 1301 (1969); 306 F. Supp. 1306 (1969); 311 F. Supp. 265 (1970) 5
Swann v. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503 (W.D. N.C. 1970) 1
Swift & Co. v. Wickman, 382 U.S. 111 (1965) 19, 43

Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1958) 42
Turner v. Memphis, 369 U.S. 350 (1962) 43

United States v. Board of Public Instruction of Polk County, 395 F.2d 66 (5th Cir. 1968) 32
United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967) 31, 32
United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) 18, 31, 32
United States v. Peters (US) 5 Cranch 115 (1809) 18, 38
United States v. Wallace, 222 F. Supp. 485 (M.D. Ala. 1963) 40

Walker v. County School Board of Brunswick County, 413 F.2d 53 (4th Cir. 1969) 30
Wanner v. County School Board of Arlington County, 357 F.2d 452 (4th Cir. 1966) 18, 32

PAGE

Youngblood v. Board of Pubic Instruction of Bay County, Fla., —— F.2d —— (5th Cir., No. 29369, July 24, 1970) 32

Statutes:

28 U.S.C. §1253 ..... 1, 19, 43

28 U.S.C. §2281 ..... 6, 11, 12

28 U.S.C. §2283 ..... 19, 42

28 U.S.C. §2284 6

New York Education Law, Section 3201(2) (McKinney 1970) 33

N.C. Gen. Stat. §115-176.1 ..... 3, 8, 11, 17, 20, 22, 25, 26, 27, 29, 30, 33, 34, 35, 36, 38, 43, 44

Other Authorities:

1A Moore's Federal Practice 42

NEA, National Commission on Safety Education, *1968-1969 Statistics on Pupil Transportation*, 1970 12

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEES

Opinions Below

The opinion of the three-judge district court is reported as *Swann* v. *Charlotte-Mecklenburg Board of Education* (also *Moore* v. *Charlotte-Mecklenburg Board of Education*), 312 F. Supp. 503 (W.D. N.C. 1970).

Jurisdiction

Appellees submit that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. §1253 because the case is not a "civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges" (emphasis added). Appellees' argument in support of the contention that a three-judge court was not required appears *infra* in Argument III.

Questions Presented

1. Whether the judgment of the court below that a part of the North Carolina anti-busing law is unconstitutional should be affirmed:

(a) on the ground that it violates the equal protection clause by interfering with school boards' affirmative duty under *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), to eliminate dual school systems;

(b) on the ground that it effects a racial classification which violates the principles stated in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967);

(c) on the ground that it violates the Supremacy Clause by seeking to overturn the desegregation decisions of the federal courts and in particular the decisions of the federal district court in the Charlotte-Mecklenburg case.

2. Whether the court below properly (a) denied motions to dismiss various defendants and (b) restrained parties from seeking to enforce the anti-busing law by state court injunction proceedings.

3. Whether the appeal should be dismissed on the ground that no direct appeal is permitted inasmuch as the statute involved was so clearly unconstitutional that no three-judge court was required under the doctrine of *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

Statement

Introduction

This case is here on direct appeal to review a judgment of a three-judge district court which held that a portion of N.C. Gen. Stat. §115-176.1, known as the anti-bussing law, was unconstitutional because it interfered with the affirmative duty of local school boards under the Fourteenth Amendment to desegregate racially segregated public schools and also violated the Supremacy Clause of Article VI. The court enjoined all parties "from enforcing, or seeking the enforcement of" the unconstitutional portion of the statute. The proceeding in the three-judge court was an ancillary proceeding connected with the school desegregation case involving Charlotte-Mecklenburg which is also now pending here as *Swann* v. *Charlotte-Mecklenburg Board of Education*, O.T. 1970, No. 281, certiorari granted June 29, 1970.

This appeal was taken by the North Carolina State Board of Education and four state officials.[1] The Charlotte-Mecklenburg Board of Education also filed a notice of appeal from the same order, but has not filed a jurisdictional statement or docketed its own appeal. Instead, the local school board has filed a motion in this Court to join in the appeal of the state board of education, pursuant to this Court's Rule 46.

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[1] Appellants herein include the State Superintendent of Public Instruction, the Governor of North Carolina, the Controller of the State Board of Education, and a judge of the Superior Court of Mecklenburg County who issued an order allegedly interfering with the federal court desegregation orders. No notice of appeal was filed on behalf of the additional parties defendant Tom B. Harris, et al., the plaintiffs in the state court proceeding of *Harris* v. *Self;* nor was notice of appeal filed on behalf of James C. Carson, although the state argues in its brief that it is prosecuting the appeal on his behalf (Brief of the Attorney General of North Carolina, pp. 10-12. As to the notice of appeal, however, see A. 107-108.)

Another appeal from the same judgment is also pending here as No. 444, O.T. 1970, *sub nom. Moore* v. *Charlotte-Mecklenburg Board of Education.* The *Moore* case was consolidated for hearing with the instant case in the three-judge district court. It began as a suit in a state court by parents seeking to enjoin the Charlotte-Mecklenburg Board of Education from carrying out the desegregation orders issued by the federal district court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 281, O.T. 1970, cert. granted June 29, 1970. The Negro plaintiffs in the *Swann* case were not named as parties in the *Moore* case; only the school board is named as a defendant below and an appellee in this Court. The school board removed the *Moore* case to the United States District Court, but both below and here has agreed with and supported the argument of the plaintiffs-appellants Moore, et al. that the North Carolina anti-bussing law is valid. The Negro plaintiffs Swann, et al. moved in the district court for an order adding the plaintiffs in the *Moore* case as parties-defendants and enjoining them from interfering with the district court's desegregation orders. The order issued below, as noted above, enjoins all parties in both cases, including *Moore, et al.,* from enforcing or seeking enforcement of the unconstitutional portion of the anti-bussing statute.

Proceedings during 1969-70 before a Single District Judge

The school desegregation case brought by Negro pupils and parents against the Charlotte-Mecklenburg Board of Education was commenced in 1965 and there has been extensive litigation ever since which has culminated in the *Swann* case now pending in this Court. A full statement of the history of the proceedings from 1965 to date is contained in Petitioners' Brief in *Swann,* No. 281, O.T.

1970.[2] The case has resulted in numerous reported decisions which are cited in the note below.[3]

On April 23, 1969, after a plenary hearing, the district judge rendered a decision and order finding that the school system was still unlawfully segregated and directing that defendants file a plan for complete desegregation of the system (*Swann, supra,* 300 F. Supp. 1358; App. No. 281, p. 285a-323a). The court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, transportation or bussing of students and any other method which would effectuate a racially unitary system (App. No. 281, p. 315a-316a). Extensive litigation ensued as the board submitted a series of proposals and the court rejected them as unsatisfactory to disestablish the segregated system (App. No. 281, pp. 448a-458a; 579a-592a, 698a-716a, 819a-839a). In the midst of this litigation about the remedy to implement the April 23 decision, the North Carolina legislature enacted the anti-bussing bill proposed by a member of the Mecklenburg delegation (A.63-93). The measure which was ratified July 2, 1969, included the following two sentences (later held unconstitutional):

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national

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[2] The parties in this case, No. 498, have stipulated that the record and printed appendix in No. 281, O.T. 1970 and No. 349, O.T. 1970 constitute and shall be used as a part of the record in this case. This is consistent with the view of the case taken by the court below. Citations to the Appendix in Nos. 281 and 444 are indicated. The appendix in this case is cited as "A. —".

[3] See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (W.D. N.C. 1965), *affirmed,* 369 F.2d 29 (4th Cir. 1966); 300 F. Supp. 1358 (1969); 300 F. Supp. 1381 (1969); 306 F. Supp. 1291 (1969); 306 F. Supp. 1299 (1969); 306 F. Supp. 1301 (1969); 306 F. Supp. 1306 (1969); 311 F. Supp. 265 (1970).

> origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing (A.91).

Plaintiffs in the *Swann* case promptly obtained leave to file a supplemental complaint which sought injunctive and declaratory relief against the above-quoted portion of the anti-bussing law; they asked that a three-judge court be convened pursuant to 28 U.S.C. §§2281 and 2284 (App. No. 281, pp. 460a-479a). However, no three-judge court was convened at that time and the court took no action on the requests for relief because the school board thought that the anti-bussing law did not interfere with the school board's proposed plan to bus about 4,000 black children to white suburban schools (306 F. Supp. at 1295; App. No. 281, p. 585a).

After further hearings to consider the board's further proposals during the fall of 1969 and the operation of the interim plan (which involved bussing black children to formerly white schools), the district court finally directed that a plan be prepared by the court's expert consultant (App. No. 281, p. 698a-717a). The court consultant's plan was ordered into effect in an order entered February 5, 1970, reported at 311 F. Supp. 265 (App. No. 281, 819a-839a). The February 5 order provides for the alteration of some school attendance areas, the creation of certain "satellite" or non-contiguous zones from which pupils would be transported to school, the pairing and clustering of certain schools with the alteration of grade structures, and transportation for pupils who live more than walking distance (as determined by the board) from the school to which they are assigned. The pairing and clustering of 10 black

and 24 white elementary schools will result in pupils of both races being transported to schools which were formerly segregated. The district court made extensive supplemental findings about the amount of transportation required and its relation to the large school bus transportation system which was already in operation in the community (App. No. 281, p. 1198a-1220a).

Obstruction of the District Court Orders; Convening of Three-Judge Court

Following the order of February 5, 1970, numerous citizens, under the banner of "Concerned Parents Association," held meetings to protest the order, vowing to defy, delay, obstruct and in any way prevent its implementation. On January 30, 1970, they filed a proceeding in the Mecklenburg County Superior Court (*Harris* v. *Self*) and obtained an *ex parte* temporary restraining order, purportedly preventing the superintendent from paying the fees and expenses of the court consultant as directed on December 2, 1969. (Appendix A, *infra* 6a). They filed an amended complaint on February 12, 1970, in the Mecklenburg County Superior Court and obtained an amended temporary restraining order which enjoined the Charlotte-Mecklenburg Board of Education from expending any money for the purpose of purchasing or renting any motor vehicle or operating or maintaining such for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg school system from one school to another and from one district to another (Appendix A, *infra* 19a). The order entered by the Mecklenburg Superior Court on January 30, 1970, was modified to permit payment of the court consultant on approval of the Board of Education (Appendix A, *infra,* 21a).

On February 11, 1970, Governor Robert W. Scott issued a public statement to the effect that North Carolina General

Statute §115-176.1 prohibited the involuntary bussing of students, that he had taken an oath to uphold the laws of the State of North Carolina, and that he was directing all officials to enforce this statute (Appendix A, *infra* 23a). On February 12, 1970, Governor Scott instructed the Director of the Department of Administration that "use of public funds for providing bus transportation shall be strictly in accordance with the appropriations made by the 1969 General Assembly, and for no other purpose. No authorization will be given for use of any other funds to provide bussing to achieve school attendance for the purpose of creating a balance or ratio, religion or national origins" (sic.) (Appendix A, *infra* 26a). Copies of the letter were forwarded to Dr. A. Craig Phillips, the Superintendent of Public Instruction; Dr. Dallas Herring, Chairman of the State Board of Education; Mr. A. C. Davis, the Controller of the State Board of Education; and Mr. Tom White, Chairman of the State Advisory Budget Commission. Shortly thereafter, Dr. A. Craig Phillips issued a similar statement and further advised that he was opposed to bussing (Appendix A, *infra* 27a). On February 23, 1970, he wrote to Dr. William S. Self, Superintendent of the Charlotte-Mecklenburg Schools and advised, "No additional State funds will be allocated to the Charlotte-Mecklenburg Board of Education to provide bussing of students for the purpose of creating a balance or ratio of students in the schools." On the same date, Mr. A. C. Davis directed a memorandum to the superintendent of each local school system in the State advising that the General Assembly had appropriated funds for the operation of 9,510 buses during the 1969-70 school year and 9,635 buses during the 1970-71 school year. The memorandum advised that approximately 9,443 buses were presently in use and that, "The appropriation does not include funds for the transportation of thousands of additional students

and the operating costs of hundreds of additional buses which might be made necessary by the reorganization of schools. No additional State funds will be allocated to school administrative units to provide bussing of students for the purpose of creating a balance or ratio of students in schools."

On February 13, 1970, plaintiffs moved the court (A. 46-50; App. No. 281, p. 840a) to add as additional parties-defendant the Governor of the State; Mr. A. C. Davis, Controller of the State Board of Education; the Honorable William K. McLean, the Superior Court Judge who issued the temporary restraining order; each plaintiff in the Superior Court proceeding and their attorney. Plaintiffs also asked the court to add as additional parties-defendant the Honorable James Carson who initially proposed the statute here in question and who had made several public statements of his intention to file a proceeding in the state court to enjoin the school board from complying with the February 5, 1970, order of the court. Plaintiffs further sought to enjoin the enforcement of the state court restraining order as modified on February 12, 1970, and to enjoin the defendants from further interference with the implementation of the orders of the district court.

On February 20, 1970, the resident district judge entered an order reciting the various events and requesting that the Chief Judge of the Circuit designate a three-judge district court (A. 19-22; App. No. 281, p. 845a). A three-judge court was designated on February 24, 1970, and additional parties were added by order of February 25, 1970 (A. 17-18; App. No. 281, p. 901a).

Meanwhile, on Sunday night, February 22, 1970, approximately 50 adults on behalf of themselves and their children filed another proceeding (*Moore* v. *Charlotte-Mecklenburg Board of Education*) in the Mecklenburg County Superior

Court seeking to restrain desegregation of the Charlotte-Mecklenburg schools as directed by the district court. At 10:16 p.m. on that Sunday night, the Honorable Frank Snepp issued an *ex parte* temporary restraining order enjoining the Charlotte-Mecklenburg Board of Education and its Superintendent

> from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color. (App. No. 444, p. 19-20).

On Thursday, February 26, 1970, the board removed the *Moore* case to the United States District Court (App. No. 444, p. 21-22). At a special meeting of the board on Friday, February 27, 1970, the board chose to comply with the order of the state court rather than the orders of the federal district court. The Superintendent announced that all planning and activities then underway for implementation of the district court's order of February 5, 1970, were terminated (App. No. 444, p. 31 or App. No. 281, p. 925a). On the same date, plaintiffs moved the court to add the plaintiffs in the *Moore case*, their lawyers and the Honorable Frank Snepp as additional parties-defendant in this case. Plaintiffs further sought an order enjoining the enforcement of the state court order and enjoining any further efforts by all of the defendants from taking steps which would prevent or inhibit the implementation of the orders of the district court. Plaintiffs also sought an order finding all members of the Charlotte-Mecklenburg Board of Education and its Superintendent in contempt and imposing a fine or imprisonment for each day that the defen-

dants failed to comply with the court's orders. (App. No. 281, p. 814a-917a).

Judge McMillan on March 6, 1970, entered an order decreeing that the order by Superior Court Judge Snepp in the *Moore* case "is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970" (App. No. 281, pp. 925a-927a).[4] The three-judge court court eventually ruled in an opinion dated April 28, 1970, that the challenged portions of the anti-bussing law were unconstitutional in violation of the equal protection clause of the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution (312 F. Supp. 503, 510; A. 2; App. No. 281, p. 1305a). The initial opinion denied injunctive relief and granted only a declaratory judgment. However, this portion of the original opinion was withdrawn[5] and the court enjoined all of the parties in the *Swann* and *Moore* cases from "enforcing, or seeking the enforcement of" the unconstitutional portion of N.C. Gen. Stat. 115-176.1.

Although plaintiffs Swann, et al. originally sought a three-judge court, they subsequently urged upon the district court that it was empowered to act on the matter as a single judge and that a three-judge court was not required by 28 U.S.C. §2281 because of the doctrine of *Bailey*

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[4] Both the attorney general and the state court plaintiffs made repeated efforts to disqualify or recuse Judge McMillan from sitting on the three-judge panel. See App. No. 281, p. 1, docket entries Nos. 143, 146, 148, 149, 154. On March 9, 1970, Chief Judge Haynsworth of the Fourth Circuit denied the motions to disqualify. Docket entry 155.

[5] The three-judge court determined to grant an injunction rather than merely a declaratory judgment after taking note of this Court's decisions in *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970), and *Mitchell* v. *Donovan*, 398 U.S. 427 (1970).

v. *Patterson*, 369 U.S. 31 (1962). The three-judge court rejected these arguments that a three-judge court was not required.[4] (312 F. Supp. 503, 507.)

Some Facts on Student Transportation

Student transportation has become an important, and indeed, an essential auxiliary service in today's education. Nationally, over 18 million students were transported daily to public schools during the 1969-70 school year. This represented approximately 40% of the total public school enrollment. NEA, National Commission on Safety Education, *1968-69 Statistics on Pupil Transportation*, 1970.

Approximately 55% or 610,760 students in North Carolina were transported during the past school year. Transportation was offered to all public school pupils who lived more than one and one half miles from the school to which they were assigned and who: (a) resided outside of the city limits; (b) resided outside the city limits as it existed prior to 1957; (c) resided within the city limits but who were assigned to a school outside the city limits or outside of the city limits as it existed prior to 1957; and (d) resided outside the city limits and were assigned to a school within the city limits. While local school units initially purchased school buses, operating costs and replacements of the buses were paid by the state.

Pursuant to state statutes, the North Carolina State Board of Education adopted rules and regulations to govern transportation of students. (Plaintiffs Exh. 71 for

[4] The court below said that it rejected "plaintiffs' attack upon our jurisdiction" (312 F. Supp. at 507). However, plaintiffs, by a brief filed in the trial court sought to make clear that their argument that a single judge might properly have disposed of the case was not a denial that the three-judge district court had *jurisdiction* over the matter, but rather that three judges were not required to decide the case under 28 U.S.C. §2281.

March 1970 hearing in original record). The State Superintendent of Public Instruction had to approve any additions to the bus fleet or replacements of old buses by local units. Local units were also permitted to contract transportation of students who qualify under state law with private transportation companies in lieu of purchasing and operating school buses.

On August 13, 1969, a three-judge court in *Sparrow* v. *Gill*, 304 F. Supp. 86 (W.D. N.C. 1969) held that the state statute which authorized transportation of city students who live in areas annexed by a city subsequent to 1957 discriminated against other city students who were denied transportation. The State Board then amended its regulations to authorize transportation of all public school children who live more than one and one-half miles from their school whether or not they reside within the city limits. This regulation has substantially increased the number of students transported in North Carolina.

Even prior to the *Sparrow* decision, the State Board of Education and State Superintendent made efforts to secure transportation for all students who resided more than one and one half miles from their school. Similar recommendations had been made by a study commission appointed by the Governor in 1968 (App. in No. 281, 1202a; Plaintiff's Ex. 13 at March 1970 hearing in original record).

The district court quoted the relevant state-wide data on transportation of students in its Supplemental Findings of March 21, 1970:

> "The average school bus transported 66 students each day during the 1968-69 school year; made 1.57 trips per day, 12.0 miles in length (one way); transported 48.5 students per bus trip, including, students who were transported from elementary to high school.

"During the 1968-69 school year:

610,760 pupils were transported to public schools by the State

54.9 percent of the total public school average daily attendance was transported

70.9 percent were elementary students

29.1 percent were high school students

3.5 students were loaded (average) each mile of bus travel

The total cost of school transportation was $14,293,272.80, including replacement of buses: The average cost, including the replacement of buses, was $1,541.05 per bus for the school year—181 days; $8.51 per bus per day; $23.40 per student for the school year; $.1292 per student per day; and $.2243 per bus mile of operation. (Emphasis added.)" (App. in No. 281, p. 1199a)

The Charlotte-Mecklenburg Board of Education transported approximately 23,600 students during the 1969-70 school year. An additional 5,000 students rode the public transportation system at reduced fares. To transport the 23,600 students the Charlotte-Mecklenburg Board of Education operated 280 buses; made an average of 1.8 trips per day per bus and carried an average of 83.2 students per bus daily. Each bus averaged 40.8 miles round trip per day and each trip took approximately one hour and 15 minutes one way.

The board also transported more than 700 kindergarten children, ages 4 and 5, from 7 to 30 miles one way each day. (Br. A16, A24.)[7]

[7] The district court opinion of August 3, 1970, reprinted as the Appendix to Petitioner's Brief in No. 281, is cited as "Br. A. —."

Transportation costs in the Charlotte Mecklenburg system have been relatively inexpensive, less than 1% of the annual operating budget. The average cost for transportation per pupil was $20.00 per year or 22 cents per day. As indicated above, this closely approximates the average per pupil cost on the state level.

Finding this extensive transportation and its relative economy, the district court saw no reason why transportation could not equally be afforded to students in order to desegregate the school system (App. in No. 281, 1198a-1209a; Br. A10-A26). The court noted that transportation had been extensively used in order to maintain and to perpetuate segregated schools (1200a). Through the 1964-65 school year, the Charlotte-Mecklenburg Board of Education maintained racially overlapping attendance zones in order to transport black students to black schools and white students to white schools (App. No. 281, p. 1011a). Even during the 1969-70 school year when overlapping bus routes had ostensibly been eliminated the school board had continued to arrange transportation in order to perpetuate segregated schools. Black schools had been conveniently located near black residential areas as walk-in schools. White schools had been located in outlying white areas necessitating transportation of students. Thus, of the 23,600 students transported during the 1969-70 school year, only 541 of these students were transported to black schools (App. No. 281, 1014a-1032a; 1203a- 1204a).

The district court further noted that in addition to transportation, school district zones had been controlled in order to preserve segregated schools. The court stated in its order of June 20, 1969:

> This issue was passed over in the previous opinion upon the belief which the court still entertains that the defendants, as a part of an overall desegregation

plan, will eliminate or correct all school zones which were created or exist to enclose black or white groups of pupils or whose population is controlled for purposes of segregation. However, it may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy (App. No. 281, 455a-456a).

See also Reply Brief of Petitioners and Cross Respondents, in Nos. 281 and 349, pp. 3-17.

The court found that transportation of students would be necessary in order to desegregate the schools under any plan that might be directed:

"Both Dr. Finger and the school board staff appeared to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose led in one fashion or another to that conclusion" (1208a).

The plan proposed by the Charlotte-Mecklenburg Board of Education would require transportation of an additional 5,000 students.

The court stated in its Memorandum Decision of August 3, 1970 that although additional transportation would be required under the plan directed by the court, comparable transportation would be required under the other plans, with the exception of the plan submitted by the board (Br. A23). The court found, however, that the board had the facilities and personnel to implement the plan directed without any additional capital outlay during the first school year.

> No capital outlay will be needed to operate buses for the 1970-71 school year. The state is ready and willing to lend the few buses the board may need; replacements can be bought after actual need has been determined under operating conditions (Br. A23).

As the court had previously noted, the only thing necessary for the board to implement the plan directed was the willingness of the members of the board to discharge their constitutional responsibilities to the black children in the school system (App. No. 281, 1219a-1220a).

Summary of Argument

I.

A portion of N.C. Gen. Stats. §115-176.1 was properly held to be in violation of the Equal Protection and Supremacy Clauses of the Constitution.

The act limits a school board's powers to effectuate desegregation of the schools in a manner which conflicts with the board's affirmative duty to eliminate a dual school system as declared in *Green* v. *County School Board of*

New Kent County, 391 U.S. 430 (1968). School boards have an affirmative duty to bring about unitary systems and to that end they may use a variety of techniques of desegregation. Remedial measures for desegregation may not be limited by an artificial concept of color-blindness which functions to enable racial discrimination to continue. *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Wanner* v. *County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966); cf. with respect to jury discrimination Judge Brown's opinion in *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966, *en banc*).

The act violates the principles of *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), in that it effects an expressly racial classification which makes it more difficult for black citizens to achieve school integration, and its purpose and effect as revealed by its entire context is to encourage the maintenance of segregation. New York's similar law was invalidated on these grounds. *Lee* v. *Nyquist*, — F. Supp. — (W.D. N.Y., Civil-1970-9, Oct. 1, 1970) (three-judge court).

The court below also correctly concluded that the Act violates the Supremacy Clause by attempting to nullify federal court desegregation mandates. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960) (three-judge court), stay denied, *Louisiana* v. *United States*, 364 U.S. 500 (1960), affirmed, 365 U.S. 569 (1961); *United States* v. *Peters* (US) 5 Cranch 115, 136 (1809).

II.

The various state officials were properly named as additional defendants because the record shows that they in fact took actions which threatened to interfere with Judge McMillan's court ordered desegregation plan in the Charlotte-Mecklenburg school case.

The district court was empowered by 28 U.S.C. §2283 to stay state court proceedings to protect or effectuate its own judgments. *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La. 1960) (three-judge court), affirmed, 365 U.S. 569; *Thomason* v. *Cooper*, 254 F.2d 808 (8th Cir. 1958); *Meredith* v. *Fair*, 328 F.2d 586 (5th Cir. 1962), (*en banc*).

The court below properly rejected appellants' arguments based on the Civil Rights Act of 1964 because that Act does not limit the powers of the courts to remedy unconstitutional racial segregation in the schools.

III.

The direct appeal should be dismissed because the three-judge court was not required by any Act of Congress. 28 U.S.C. §1253. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). The challenged portions of the anti-bussing act presented no substantial question and were plainly unconstitutional under this Court's *Green* decision, *supra*. No three-judge court was required under *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962). Implementation of the requirement that dual systems be dismantled at once is delayed by unnecessarily convening three-judge courts to rule on segregation laws.

ARGUMENT

I.

The Court Below Correctly Held That a Portion of N.C. Gen. Stat. § 115-176.1, Known as the Anti-Busing Law Is Unconstitutional and in Violation of the Equal Protection Clause and the Supremacy Clause of the Constitution of the United States.

A. *Introduction—The Provisions of the Statute.*

The North Carolina anti-busing law, N.C. Gen. Stat. §115-176.1 (Supp. 1969), was ratified and became effective July 2, 1969.[8] It was entitled "An Act to protect the neigh-

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[8] NORTH CAROLINA
GENERAL ASSEMBLY
1969 SESSION
RATIFIED BILL
CHAPTER 1274
HOUSE BILL 990

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter 115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or oper-

borhood school system and to prohibit the involuntary bussing of pupils outside the district in which they reside." Our supplemental complaint challenged the validity of only the last two sentences[9] in the second paragraph of the sec-

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ating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

House Bill 990

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. P. TAYLOR, JR.
H. P. Taylor, Jr.
President of the Senate.
PHILIP P. GODWIN
Philip P. Godwin
Speaker of the House of Representatives.

House Bill 990

[9] Supplemental Complaint, para. I (A. 23-24).

tion, and it is only these two sentences—quoted hereafter—which the three-judge court restrained and declared in violation of the Equal Protection and Supremacy Clauses:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The first paragraph of §115-176.1 prohibits the exclusion of persons from public schools on account of race, and prohibits the drawing of attendance districts for the purpose of segregating persons "of various races, creeds, colors or national origins from the community." The first sentence of paragraph two permits (but does not require) school authorities to assign pupils to schools by attendance zones and states that boards may assign pupils outside their zones to attend specialized schools "or for any other reasons which the board of education in its sole discretion deems sufficient." The next sentence—as quoted above—forbids the assignment of students "on account of race," etc. or "for the purpose of creating a balance or ratio of race, religion or national origins." This is followed by the ban on "involuntary bussing of students in contravention of" the act, and the use of public funds to support such bussing. The third paragraph excepts from the act temporary assignments due to the unsuitability of a school, or assignments necessitated by overcrowding of schools or—in broad terms—"other circumstances which, in the sole discretion of the School Board, require assignment or reassignment." The fourth paragraph permits assignments on the basis of parental or pupil request pursuant to a "freedom

of choice plan voluntarily adopted by the board of education."

As the opinion below states, both counsel for the appellees Swann, et al. and the Attorney General of North Carolina construed the statute in much the same way (A. 7-8). As decribed by Judge Craven:

> The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race.... [H]e recognizes of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice. (A. 8.)

Appellees believe that the act's prohibition against assignments compelling a student to attend a school "for the purpose of creating a balance or ratio of race . . ." forbids the use of a variety of desegregation techniques such as redesigning zones so as to promote desegregation, pairing schools or altering grade structures for the same end, closing or consolidating schools to aid integration, or controlling school sizes by new construction, expansions, or the use of portable classrooms, or location of school sites to affirmatively promote integrated school systems. The antibussing sentence forbids the use of existing transportation facilities to promote desegregation or the initiation or ex-

pansion of bus services for that end unless pupils volunteer to ride such "desegregation buses." The effect of the provision is to disable the board from changing assignment patterns of any objecting pupils who previously resided within walking distance (1½ miles) of their schools for the purpose of desegregating the school system.

The available materials indicating the legislative history[10] of the anti-bussing law confirms this understanding of the legislation.[11] The bill's sponsor, Mr. Carson, an attorney,[12] said the purpose of the bill was stated in its title: "to protect the neighborhood school system and to prohibit the involuntary busing of pupils outside the district in which they reside" (A. 67). He said that "involuntary" busing

[10] Copies of the bill as originally introduced in the North Carolina House of Representatives, and the amendments made in a house committee substitute and by the state senate are explained in the deposition of the bill's sponsor, State Rep. James H. Carson, Jr. who represents Mecklenburg County in the legislature (A. 64-88; various amendments and versions of the act appear at A. 89-93).

[11] The original proposal by Rep. Carson on May 7, 1969 (A. 69, 74), designated House Bill DRH 255, provided that no pupils be assigned outside their districts of residence except upon parental application; that pupils be assigned to the closest school to their homes in multi-school districts; that boards may provide transportation for pupils assigned within or without their districts in the boards' "discretion," but that pupils might not be bused outside their districts to a more distant school except by their parents' choice. The bill made no mention of race or color at all. The bill as passed by the House and sent to the Senate (H.B. 990) appears at A. 90-91. This version was a committee substitute more nearly approximating the finally enacted bill. The committee substitute contained the language held invalid by the court below—the second and third sentences in present paragraph two. The Senate amendments added (in addition to grammatical changes) the proviso about assigning pupils outside their zones to specialized schools (first sentence of paragraph two) and the reference to freedom of choice plans (end of paragraph four).

[12] Mr. Carson was added as a defendant in this case not because of his legislative role but because he threatened to file proceedings in state court to prevent implementation of the court-ordered desegregation plan (A. 47, 53).

refers to the decision of pupils and parents (A. 80); that the bill would prevent implementation of the Finger Plan ordered by Judge McMillan which required clustering and pairing of thirty-four elementary schools and the transportation of pupils (A. 85-86). The fact that the bill was intended by its sponsor to conflict with Judge McMillan's April 23, 1969, order in the *Swann* case is confirmed by the testimony of Mr. Carson:

> Q. Look down, the report shows a question asked you by Rep. Arthur H. Jones of Mecklenburg regarding any possible conflict between the bill and the decision of the Court should that become law. Would the quotation there coming from you be correct? A. Not completely, no. There could be a conflict or there could not be, depending on what the Local Board decided to do.
>
> Q. Do you recall whether you said: "Well, of course, I see a conflict. If there were no conflict I don't think there would be any need for the bill."
>
> Mr. Waggoner: Objection.
>
> A. I don't recall whether I said it or not. I don't deny it, I just don't recall it.
>
> Q. You might have said it? A. Yes.

The state court judges who applied §115-176.1 in the two cases brought suit against the Charlotte-Mecklenburg School board (Judge McLean in *Harris* v. *Self, supra,* and Judge Snepp in *Moore* v. *Charlotte-Mecklenburg Bd. of Ed., supra*) issued temporary injunctions applying the law to prevent implementation of the court-ordered Finger desegregation plan. The *Harris* v. *Self* order (*infra* 19a) enjoins the board from spending any funds "for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district." Thus the order

broadly purports to block any reorganization of the system to desegregate the schools which involves "involuntary bussing." The order makes no distinctions based on the distances involved, age of the pupils or any such factors. The *Moore* case order (issued *ex parte* on a Sunday night) broadly enjoins "any plan or program under which any children . . . are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed . . . school because of their race or color." (App. in No. 444, pp. 20-21.)

The school board upon being served with the *Moore* injunction, promptly determined without any inquiry of Judge McMillan to obey the state court order and directed the school staff to take no further steps to obey Judge McMillan's desegregation decree.[13] (App. No. 281, p. 925a; App. No. 444, p. 31.)

B. *The statute unconstitutionally interferes with the school board's affirmative duty to dismantle the dual system.*

The court below correctly concluded that the purpose and effect of section 115-176.1 was to prevent school boards in North Carolina from performing their affirmative constitutional duties to implement *Brown* v. *Board of Education*, 347 U.S. 483 (1954), (*Brown I*), *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*), and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). We believe that the court below was so plainly correct in applying this Court's decisions to invalidate the section that the case merits either summary affirmance or dismissal of the appeal.*

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[13] The school board in 1969 took the view that §115-176.1 did not affect their discretion to adopt a plan to close inner city black schools and bus the pupils to white schools. (*Swann*, *supra*, 306 F. Supp. at 1295; App. No. 281, p. 585a).

* See Motion to Affirm or Dismiss filed herein.

The *Green* case held—in language applicable to Charlotte—that boards "operating state compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (391 U.S. at 437-438). Boards are required by *Green* to eliminate racially identifiable segregated schools and to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (379 U.S. at 442). The Attorney General of North Carolina, in defending the anti-busing law, directly challenges the holding in *Green* in his brief in this Court:

> There is no way, considering the relation of the number of blacks to the number of whites, to establish schools "in which there are no white schools and no Negro schools but just schools." (Appellants' Brief, p. 16.)

The Attorney General argues that §115-176.1 directs the "establishment of *reasonable attendance areas* and the preservation of the so-called 'neighborhood school . . . [with] transportation of pupils on a nonracial basis. . . ." (Appellants' Brief, p. 16; emphasis added). The statute attempts to limit the remedies available to a school board or a federal court to change the dual system to freedom of choice plans, voluntary busing plans, or some kind of geographic zoning (variously called—by the appellants and the court below—"neighborhood" zoning, "reasonable" zoning, "non-gerrymandered" zoning, or zoning to the school nearest pupil's homes).

The three-judge court concluded that notwithstanding the federal courts' deference to such an expression of state legislative policy in favor of "neighborhood schools", such

a policy could not override the duty imposed by *Brown* and *Green*. Where—as in Charlotte—a "neighborhood" assignment policy cannot dismantle the state-created dual school system and eliminate all-black schools, a law which compels a neighborhood plan is simply a segregation law. In Charlotte, where all-black schools in black neighborhoods have been created by the acts of the school board and other governmental agencies, a requirement of neighborhood schools is simply a requirement for black schools in direct disobedience of *Brown I*. School desegregation plans must be designed so that they will work to dismantle state-created dual systems of separate white and black schools. A "neighborhood" policy or law which preserves the pattern of separate black and white schools is in direct opposition to *Green* as the Attorney General's brief has substantially admitted in the passage quoted above. Similarly, the statutory prohibition against use of school transportation facilities to eliminate racial identifiability of schools is equally in conflict with *Green*.

The provision to prohibit busing to desegregate the schools—except where pupils submit voluntarily to busing —contravenes the mandate of *Green* that boards take "whatever steps might be necessary to convert to a unitary system" (*Green, supra*, 391 U.S. at 437-438). Judge McMillan found that the use of the transportation system was *necessary* in order to afford a desegregated education to black children in certain Charlotte neighborhoods. The state may not enact a law forbidding that which is necessary to be done to obey the mandate of *Brown I*. The content of the statute's ban on busing is sufficiently vague that it affords little guide to differentiating legal busing from illegal busing. The net effect is to leave the matter of busing to the discretion of school boards. But despite the normal area of school board discretion about such matters

the ultimate decision about whether facilities which are necessary to integrate the school will be used cannot be left as a matter of discretion. *Green* requires that the boards do whatever is necessary to dismantle the dual system of black schools and white schools and eliminate racially identifiable schools where black pupils are set apart.

Section 115-176.1 would prevent the use of a variety of assignment methods and techniques which are being widely used to desegregate school systems. The law threatens to interfere with such techniques as school closing and consolidations, rezoning methods and techniques (zones designed to promote integration, non-contiguous zones), grade structure changes, the use of pairing and clustering techniques, and the control of school sizes by use of portable classrooms, building sizes, and site location when these methods are used for the purpose of controlling the racial composition of school populations. The Fourth Circuit has decided in the Charlotte case that all such methods must be considered in evaluating the available alternatives to desegregate the schools. We believe that the court was correct in viewing these techniques as appropriate remedies consistent with the "practical flexibility" mandated by *Brown II* (349 U.S. 294, 300) (App. No. 281, p. 1274a). Section 115-176.1 seeks to deprive the boards and courts of the necessary flexibility to accomplish the needed reforms.

The North Carolina Attorney General complains that the court below fails to define the constitutional objective of a unitary school system. But neither the Attorney General's Brief nor the anti-busing law suggests any principle of law for deciding such matters except that school boards be left alone to decide for themselves how much desegregation to accomplish. The entire appeal for a "neighborhood school" system—which has never existed in the Charlotte-Mecklenburg system—is in reality an

appeal for the courts to let the school boards use their control and their discretion to define school attendance. The "neighborhood school system" is primarily a political slogan, and the appellants seek to have the matter of eliminating school segregation resolved in the political process by elected school boards. The constitutional rights of black children under the *Brown* decision may not, under our constitutional system of protection for the individual rights of minority group members, be left to depend upon whether segregationists can win school board elections.

A three-judge court in Alabama recently invalidated a statute which forbids assignment "for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races" etc. *Alabama* v. *United States*, —— F.Supp —— (S.D.Ala. Civil No. 5935-70-P, June 26, 1970) (reproduced *infra*, Appendix B). That statute which is similar in effect to §115-176.1 was rejected on the same grounds relied upon by the court below. The Alabama district court was of the unanimous opinion that the statute did not even present a substantial question as it was foreclosed by prior decisions of this Court.

C. *The Appellants' Argument Supporting the Statute Rests on a rejected view that there is no affirmative duty to desegregate the schools.*

The Attorney General of North Carolina relies on the idea that school authorities have no affirmative duty to bring about integration of segregated schools. He cites the doctrine of *Briggs* v. *Elliott*, 132 F.Supp. 776 (E.D.S.C. 1955), a doctrine which has been thoroughly repudiated by this Court's decision in *Green*, *supra*, as well as by the Fourth and Fifth Circuits. See e.g. *Walker* v. *County School Board of Brunswick Cty.*, 413 F.2d 53, 54, note 2

(4th Cir. 1969); and *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 846, 862-866 (5th Cir. 1966), affirmed on rehearing en banc, 380 F.2d 385, 389 (5th Cir. 1967), cert. denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840 (1967). The *Green* case made it clear that school boards must take affirmative action to root out segregation and "disestablish" the segregated systems. It is the result—whether a plan actually works to integrate the schools—that determines the adequacy of a plan to satisfy the constitutional mandate.

The appellants seek to find support for the anti-busing law in the *Brown* case itself by arguing that *Brown* rests on the premise that schools must be run on a color-blind basis. They argue that the use of color-conscious techniques to bring about school integration offends not only the anti-bussing law, but the Fourteenth Amendment as well.[14]

The appellants' argument entirely ignores this Court's recent holding—which must be taken as a repudiation of the idea that remedies for discrimination must be color-blind—in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). The case is not even cited in the Appellants' Brief.[15] The *Montgomery County* decision approved a district judge's use of specific numerical goals for faculty integration as a remedial technique necessary to accomplish the ultimate objective of eliminating the racial identifiability of faculties in a segregated system.

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[14] When a litigant sought to use the Constitution to nullify a law against employment discrimination Mr. Justice Frankfurter wrote that "To use the Fourteenth Amendment as a sword against such State power would stultify that amendment." *Railway Mail Association* v. *Corsi,* 326 U.S. 88, 98 (1945) (concurring opinion). Mr. Justice Reed called the argument "A distortion of the policy manifested in that amendment." (326 U.S. at 94) That same idea applies to appellants' argument.

[15] Appellants do however attack the requirement of faculty integration. Appellants' Brief pp. 24-25.

That decision necessarily rests on the premise that a remedial technique which is color-conscious does not offend the equal protection clause when it is used to eliminate school segregation. The *Montgomery County* decision emphasized the practical problems of a district judge seeking to eliminate an entrenched system of segregation. That difficult task cannot be accomplished by self-induced blindness to the race of the people in a segregated system. The appellants' argument that race cannot be considered in integrating the schools has been rightly rejected in a host of school desegregation decisions in the lower federal courts.[16]

The appellants attempt to support their argument by analogy from jury discrimination cases (Appellants' Brief, pp. 23-24). Judge Brown's opinion in *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966; *en banc*), cert. denied 386 U.S. 975 (1967) deals with the precise problem. Holding that realism required a consideration of race in reforming a jury system which had previously excluded Negroes, Judge Brown wrote:

> "Although there is an apparent appeal to the ostensibly logical symmetry of a declaration forbidding race consideration in both exclusion and inclusion, it is both theoretically and actually unrealistic. Adhering to a formula which in words forbids conscious awareness of race in inclusion postpones, not advances, the day

[16] *Wanner* v. *County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 244 F. Supp. 971, 981 (W.D.Okla. 1965), *affirmed* 375 F.2d 158, 169-170 (10th Cir. 1967), *cert. denied* 387 U.S. 931 (1967); *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 876-877 (5th Cir. 1966), *affirmed on rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom. Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967); *Youngblood* v. *Board of Public Instruction of Bay County*, No. 29369 (5th Cir. July 24, 1970); *United States* v. *Board of Public Instruction of Polk County*, 395 F.2d 66 (5th Cir. 1968).

> when this terrible blight of racial discrimination is exterminated. The challenge is to assure constitutional equality now. This often means, as it did in this case, eradication of the evils of the past. That evil of racial exclusion cannot be ignored. It must be reckoned with in terms which permit, indeed assure, equality for the immediate future. The evil and the evil practices are not theoretical. They are realities. The law's response must therefore be realistic." (*Brooks* v. *Beto*, 366 F.2d 1, 24 (1966).)

The anti-busing act's pretended color-blindness is also designed to postpone, not advance the elimination of segregation. The assertion that it has a benign intent is entirely belied by its inevitable and intended consequence of disabling school boards from altering the segregated systems they have established throughout North Carolina.

D. *Additionally §115-176.1 is unconstitutional because it violates the principles stated in Hunter* v. *Erickson*, 393 U.S. *385 (1969) and also the doctrine of Reitman v. Mulkey*, *387 U.S. 369 (1967).*

The judgment below invalidating a portion of section 115-176.1 may be affirmed on either of two added grounds not previously considered in the case—the doctrines of *Hunter* v. *Erickson, supra,* and *Reitman* v. *Mulkey, supra.* A sound opinion by Judge Hays for a three-judge district court has recently invalidated the New York anti-bussing law[17] on these grounds. *Lee* v. *Nyquist,* —— F.Supp.——,

[17] Section 3201(2) of the New York Education Law (McKinney 1970) enacted in 1969 was summarized by Judge Hays as a provision that "prohibits state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance". Elected boards continue to have such power. The law does not expressly mention busing.

(W.D.N.Y. Civil-1970-9, October 1, 1970) (three-judge court).

Hunter v. *Erickson, supra,* applies because the contested portions of § 115-176.1 make an "explicitly racial classification" by banning assignments of pupils, or involuntary busing "for the purpose of creating a balance or ratio of race, creed, color or national origin." This creates an invidious racial classification which denies equal protection of the laws. Under the statute school boards are permitted to assign pupils or involuntarily bus them for any reason except the purpose of creating a racial balance. Pupils might be assigned or involuntarily bused for any of a variety of reasons without violating the North Carolina law. Boards might without running afoul of the anti-bussing law bus pupils to segregate the sexes, to assign pupils by ability grouping or assign them homogeneously, to economize or achieve other advantages by consolidating small schools, to enable schools to be built on cheaper land far from residential areas or for many other reasons one might imagine. Pupils may be bused to attend picnics or sports events or concerts or for any of a variety of sightseeing outings considered part of the educational program. It is only busing to achieve racial integration which is effectively prohibited by §115-176.1. This classification treating assignments and busing involving racial criteria differently from other assignments and other busing makes it more difficult to deal with the question of racial integration in the schools. It constitutes an invidious discrimination against Negro citizens who have a right to have the segregated Negro schools designed to receive Negro children eliminated as racially identifiable institutions. There is no compelling justification for the statutory classification by race. It makes it more difficult for blacks to achieve a goal that is in their interest—racial integration of the schools.

Reitman v. *Mulkey*, 387 U.S. 369 (1967) applies because §115-176.1, serves to encourage maintenance of segregation throughout North Carolina. It is entirely obvious in the context of Judge McMillan's order to desegregate the Charlotte schools, and the entire history of sixteen years of failure to implement *Brown* in the Charlotte-Mecklenburg system and many others in the state, that the North Carolina anti-busing law was designed to preserve a degree of school segregation. The law's title includes a purpose to protect "neighborhood schools". It was enacted in direct response to a decision by Judge McMillan on April 23, 1969, that " 'Neighborhood' in Charlotte tends to be a group of homes generally similar in race and income." (App. No. 281, p. 305a), and that:

> "The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns." (App. No. 281, p. 312a).

No one who realistically views this case imagines that the anti-busing law was anything other than an effort to repudiate such holdings and establish a basis for retaining segregation. The effect of the discriminatory encouragement is obviously much stronger and more blatant in the Charlotte-Mecklenburg context than was the discriminatory encouragement found in California's Proposition Fourteen in *Reitman, supra*. See also *Lee* v. *Nyquist, supra*, and *Keyes* v. *School Dist. No. 1, Denver Colo.*, 313 F. Supp. 61 (D.Colo. 1970).

E. *The Court Below correctly Concluded that §115-176.1 also violates the Supremacy Clause of Article VI of the Constitution.*

The purpose and effect of the disputed portions of § 115-176.1 is quite manifestly an effort to prevent school boards from performing their obligations under the *Brown* decisions and overrule the mandates of the federal courts seeking to enforce the requirement of desegregation. Unhappily attempts by state legislatures to nullify *Brown* have not been infrequent, notwithstanding this Court's clear admonition in *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958): "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

The doctrine of legislative interposition and nullification of desegregation decrees has no shred of legality. *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *stay denied*, 364 U.S. 803, *judgment affirmed, Orleans Parish School Board* v. *Bush*, 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960; three-judge court), *stay denied, sub nom. Louisiana* v. *United States*, 364 U.S. 500 (1960), *judgment affirmed*, 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E.D. La. 1960; three-judge court), *judgment affirmed, New Orleans* v. *Bush*, 366 U.S. 212 (1961); *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Legislature of Louisana* v. *United States*, 367 U.S. 907 (1961) and *Denny* v. *Bush*, 367 U.S. 908 (1961); *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (E.D. La. 1961; three-judge court), *judgment affirmed, sub nom. Tugwell* v. *Bush*, 367 U.S. 907 (1961) and *Gremillion* v. *United States*, 368 U.S. 11 (1961); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), *affirmed, sub nom.*

Wallace v. *United States*, 389 U.S. 215 (1967); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961; three-judge court), *judgment affirmed*, 368 U.S. 515 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967; three-judge court), *judgment affirmed*, 389 U.S. 571 (1968); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La. 1968; three-judge court), *judgment affirmed, sub nom. Louisiana Education Commission for Needy Children* v. *Poindexter*, 393 U.S. 17 (1968); *Louisiana Education Commission for Needy Children* v. *U. S. District Court*, 390 U.S. 939 (1968) (prohibition denied); *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968; three-judge court), *judgment affirmed*, 393 U.S. 222 (1968).

The decisions of the district court in this case to require the further desegregation of the schools and to require the use of bussing and other techniques were of course not final until appropriate appeals were exhausted. But rather than resorting to appeals in due course, the state officials in North Carolina engaged in discreditable attempts to review and nullify the judgments of the district court by resort to state legislative, executive and judicial actions. These assertions of power were sought to be justified by arguments that decisions of the district court need not be obeyed and were not lawful until upheld by this Court. Such a premise must be emphatically rejected, as it was in the *Bush* case:

> From the fact that the Supreme Court of the United States rather than any state authority is the ultimate judge of constitutionality, another consequence of equal importance results. It is that the jurisdiction of the *lower* federal courts and the correctness of their decisions on constitutional questions cannot be reviewed

by the state governments. Indeed, since the appeal from their rulings lies to the Supreme Court of the United States, as the only authoritative constitutional tribunal, neither the executive, nor the legislature, nor even the courts of the state, have any competence in the matter. It necessarily follows that, pending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land and must be obeyed. Assuredly, this is a great power, but a necessary one. See United States v. Peters, supra, 5 Cranch 135, 136, 9 U.S. 135, 136. (*Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 925 (E.D. La. 1960).)

Section 115-176.1 is all the more constitutionally vulnerable because it is also a legislative effort to deprive the black pupils who are plaintiffs in the Charlotte-Mecklenburg school case (appellees) of their rights under a specific judgment of the district court. This Court unanimously rejected such an assertion of state power to set aside a federal court decree in an historic opinion by Chief Justice John Marshall delivered on February 20, 1809, and such assertions have been emphatically rejected ever since. In *United States* v. *Peters*, (US) 5 Cranch 115, 136, (1809) it was stated:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting prin-

ciples so destructive of the Union, and in averting consequences so fatal to themselves.

The three-judge court which recently invalidated Alabama's so-called Freedom of Choice act reached the same conclusion we urge here in a similar context. See *Alabama* v. *United States*, —— F. Supp. —— (S.D.Ala. Civil No. 5935-70-P; June 26, 1970) (reprinted infra Appendix B). The Alabama law involved was very similar to the New York law discussed in part I.D. supra, except that it covered all school boards and not merely appointed boards. The Alabama court thought the North Carolina law was "analogous". That opinion also cites several other unreported orders by district judges who refused to permit such intervening legislation to impede desegregation orders. See e.g. *Bivins* v. *Bibb Co. Bd. of Ed.* (M.D.Ga. No. 1926, May 22, 1970); *Lee* v. *Macon Co. Bd. of Ed.*, M.D.Ala. Civ. No. 604-E, orders dated March 12, 1970 (Tuscumbia City), March 16, 1970 (Colbert County), March 23, 1970 (Monroe County).

II.

The Appellants' Other Objections to the Judgment Below Are Also Insubstantial.

A. *The motions to dismiss were properly denied.*

The Attorney General's arguments that the State Board of Education, the Superintendent of Public Instruction, the Governor[18] and other state officers were not properly named as defendants is plainly without merit. The argument rests on assertions that under state law these officials have no responsibility for operating local schools or school buses. But the undisputed facts of record, detailed in our Statement *supra*, indicate that these state officers did in fact threaten interference with the desegregation orders issued by Judge McMillan in reliance upon the anti-busing law. This amply justified adding them as additional defendants. Cf. *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967; three-judge court), affirmed sub nom. *Wallace* v. *United States*, 389 U.S. 215 (1967) which is a state-wide school desegregation suit against state officials following the state officials' actual exercise of power over local desegregation efforts.

The state education officials in North Carolina have been held to share the affirmative duty to bring about the desegregation of schools with local officials. *Godwin* v. *Johnston County Board of Education*, 301 F. Supp. 339 (E.D.

[18] It does not matter that one of the state officers involved is the Governor of the State, for governors are in no different position than other state officials in terms of their duty to obey and not impede federal court judgments. *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932); *Faubus* v. *United States*, 254 F.2d 797 (8th Cir. 1958), *cert. den.* 358 U.S. 829; *Meredith* v. *Fair*, 328 F.2d 586 (5th Cir. 1962); *United States* v. *Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963); *Harvest* v. *Board of Public Instruction of Manatee County*, 312 F. Supp. 269 (M.D. Fla. 1970).

N.C. 1969); cf. *Bryant* v. *State Board of Assessment*, 293 F. Supp. 1379 (E.D. N.C. 1968; three-judge court). The record in this case contains extensive exhibits indicating the details of the control the state officials have over local school systems which might be used to aid or impede school desegregation. The entire school transportation system is basically dependent upon state financing and a state department of education refusal to pay operating costs for buses engaged in promoting desegregation would directly impede such a busing program.

B. *The District Court was empowered to stay State Court proceedings to protect or effectuate its judgments.*

No appeal has been filed on behalf of the state court plaintiffs in *Harris* v. *Self* or their attorneys from the judgment restraining them from seeking enforcement of the invalid parts of the anti-busing law. However the Attorney General has filed an appeal on behalf of Judge McLean one of the judges of the Superior Court who enjoined the school board from transporting pupils pursuant to the court-ordered desegregation plan.

The authority of the district court to protect its judgments adjudicating the constitutional rights[19] of citizens from being reviewed or obstructed by a state court is fundamental. As this Court made clear in *Cooper* v. *Aaron*, 358 U.S. 1, 17-19 (1968), it has been settled since *Marbury*

[19] This authority extends equally to the district court's decision (since affirmed by the Fourth Circuit) ordering the school board to pay the expenses and fees of the court's consultant Dr. John Finger. Judge McLean in *Harris* v. *Self* purported to enjoin the superintendent of schools from paying this fee without approval of the school board, which was withheld notwithstanding the fact that the Fourth Circuit decision on this question has not been stayed and no review of that decision has been sought here. See *In the Matter of Peterson*, 253 U.S. 300, 312 (1920). The issue is another manifestation of the board's recalcitrant attitude in the case.

v. *Madison* (US) 1 Cranch 137, 177 (1803) that the "federal judiciary is supreme in the exposition of the law of the Constitution."

The power of the federal district court to stay state court proceedings where necessary to "protect or effectuate its judgments" against threatened relitigation in state courts is conferred by 28 U.S.C. §2283. See 1A Moore's Federal Practice, 2319-2320, 2614-2616. Such orders restraining conflicting state court proceedings have been issued in a number of school desegregation cases. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La. 1960; three-judge court), *affirmed,* 365 U.S. 569 (1961) (both the litigants and state judge were enjoined in *Bush*); *Thomason* v. *Cooper,* 254 F.2d 808 (8th Cir. 1958); *Meredith* v. *Fair,* 328 F.2d 586 (5th Cir. 1962; *en banc*).

We take the point to be virtually conceded by appellants' brief which states with respect to Judge McLean: "The District Court's injunction as to him could be sustained as a protection of jurisdiction only, but, otherwise, Judge William K. McLean has nothing to do with the operation of schools and the busing of pupils." (Appellant's Brief, p. 11).

C. *The Civil Rights Act of 1964 does not support appellants' argument.*

Appellants sought below to support the anti-bussing law by the argument that the Congress had enacted a similar prohibition. The assertion cannot withstand close analysis. Congress did no such thing. But, the Court below simply held that the Civil Rights Act of 1964 could not be interpreted to frustrate the constitutional prohibition of segregated schools. This is exactly correct for as this Court has recently said "Congress may not authorize the states to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651, n. 10 (1966). The appellants' argument based

on the Civil Rights Act is essentially the same argument made by the Charlotte-Mecklenburg Board of Education. We have responded and showed that the federal courts have uniformly rejected the argument, and rightly so, in petitioners' Brief in No. 281, at pp. 65-66, and in petitioners' reply brief in Nos. 281 and 349, pp. 32-40. We adopt those arguments in this case.

III.

The Court Has No Jurisdiction of the Appeal Under the Doctrine of *Bailey v. Patterson*, 369 U.S. 31.

It is submitted that the Court does not have jurisdiction of a direct appeal pursuant to 28 U.S.C. §1253 because the case was not *required* by any Act of Congress to be heard by a three-judge district court. It is immaterial to this Court's jurisdiction that three judges actually sat if they were not required to sit. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

In *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962), this Court held that a three-judge court is not required "when prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." See also *Turner* v. *Memphis*, 369 U.S. 350, 353 (1962); *cf. Ex Parte Poresky*, 290 U.S. 30 (1933). We believe that these principles apply in this case because §115-176.1 is so plainly in conflict with *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). The three judge court which recently invalidated an analogous Alabama law reached the same conclusion that the unconstitutionality of the law was foreclosed by this Court's recent decisions. See *Alabama* v. *United States*, —— F. Supp. —— (S.D.Ala. Civil No. 5935-70-P, June 26, 1970 reproduced *infra appendix* B.

This Court's decisions in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S.

269 (1969), and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), require that dual school systems be desegregated *at once*. The mandate of *Alexander* requires that the lower federal courts dispose of cases involving school desegregation with dispatch. The unnecessary convening of three-judge courts to dispose of state laws seeking to prevent desegregation is not only wasteful of judicial resources but a cause of delay of substantive constitutional rights. Sixteen years after *Brown I* is far too long a period for there to be any doubt about the invalidity of laws such as §115-176.1 which have the plain purpose and effect of retaining racial segregation in the public schools.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed, or, in the alternative, that the appeals should be dismissed.

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